United States
Foreign Intelligence Surveillance Court
Washington, D.C.

In re Motion to Disclose Aggregate Data Regarding FISA Orders	)	Docket Nos. Misc. 13-03, 13-04, 13-05, 13-06, 13-07
	)	**ORAL ARGUMENT REQUESTED**

Reply in Support of Motion to Strike the Government's *Ex Parte* Response to Motions to Disclose Aggregate Data Regarding FISA Orders

According to the government, the constitutional issue at the heart of this case should be decided in a factual vacuum. The government defends its partially *ex parte*, *in camera* opposition to the providers' motion for declaratory relief by claiming that it complies with this Court's Rule 7(j) and that the providers have no need to know the underlying rationale for the government's prior restraint on their speech. But the legal *conclusions* in the government's redacted submission are not enough to satisfy Rule 7(j). The rule requires a clear articulation of "the government's legal *arguments*"—that is, the reasoning supporting those conclusions. The government's redacted filing, however, obscures from the providers critical steps in its legal argument.

The government offers no explanation of how national security would be harmed by allowing the providers—each of whom would have been or could be entrusted with the individual orders issued by the court—to access the government's response. It fails to grapple with the specifics of this case, resting its response to the providers' constitutional arguments on generalities about the protection of classified information. Refusing even to address the proposed alternatives to allow the providers access to the government's filing, the government simply asserts that the providers should litigate this case in the dark. But the government does not cite a single case in which *any* court has *ever* permitted it to justify a prior restraint on private speech without submitting

its evidence to the rigors of the adversarial process. Permitting such a course here would violate not only Rule 7(j) but also the providers' constitutional rights. Unless the government allows the providers the access they seek, the Court should strike the redacted portions of its response.

ARGUMENT

I. The government's response does not comply with Rule 7(j)

Rule 7(j) requires that, if the government submits an *ex parte* filing containing classified information, it must provide the adverse parties with a redacted version, which, "at a minimum, must clearly articulate the government's legal arguments." The redacted version of the government's submissions does not satisfy that requirement.

The government's efforts to defend its redacted submissions are unavailing because the government fails to appreciate the distinction between its legal argument and its legal conclusions. Rule 7(j) requires the government to disclose not only its conclusions but also the underlying reasoning. That reasoning is what is missing from the redacted argument on page 4 of the opposition: although the government has asserted various conclusions about how the disclosure sought in this case could harm national security, it has not articulated the basis for those conclusions. And it is no answer to say, as the government does (Opp. 3), that "[t]he redactions appear solely in the Government's descriptions of the *factual* basis" for its classification decision. Such an argument might have merit if, like most proceedings before this Court, this case turned on the validity or invalidity of a specific order or directive. But this case involves a programmatic challenge to the government's prohibition on speech about the aggregate numbers of orders that the providers may receive. The question whether such disclosure poses any risk to national security does not turn on the facts of any particular order or directive. Rather, it requires a legal conclusion based on legislative facts, that is, evidence supporting a general opinion or predictive judgment about a sociological phenomenon—here, whether and how national security targets would react to

the disclosure in question—rather than evidence related to a specific and individualized factual finding. *See Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (noting the difference between the determination of legislative facts and ordinary factual findings). As such, the "facts" the government omits are a critical element of the legal arguments before the Court.[1]

The government devotes much of its opposition to arguing that the redacted information is "irrelevant to the companies' argument about the scope of [FISA]'s nondisclosure provisions, which is an issue of statutory construction." Opp. 1; *see id.* at 7-8. The government does not say, however, that the information is irrelevant to the *government's* argument—perhaps because, if the information were irrelevant to both sides' arguments, it should be stricken as immaterial. *See* Fed. R. Civ. P. 12(f). Indeed, the government contends that the text of FISA must be construed to prohibit disclosure of the aggregate data precisely because revealing that data would damage national security. *See* Opp. Exh. A at 14 ("The implausibility of interpreting the 'secrecy of the acquisition' to reach only the identification of targets is illustrated not only by the FBI's declaration but by the wide range of other damaging disclosures that interpretation would permit."). The core reasoning of the government's argument—that the disclosures sought here would damage national security—is explained in the redacted portions of its submission. The government's assessment of harm is therefore an essential part of its argument. But the government has redacted the critical steps in its

[1] Facts are often intertwined with legal arguments and necessary to understanding legal conclusions. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 408 (2000) (noting that "it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact"); *Miller v. Fenton*, 474 U.S. 104, 113-114 (1985) (noting that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive" and that "much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis"). Here, it is critical to know whether there are facts, and what those facts may be, that justify the prohibition on truthful speech by providers about aggregate numbers of legal demands they may have received.

reasoning and refused to give the providers' counsel access to them, making the filing insufficient under Rule 7(j).

If the Court has any doubt whether the redacted brief "clearly articulate[s] the government's legal arguments" within the meaning of Rule 7(j), it still should strike the government's brief, for two reasons. First, the rule provides that a clear articulation of a brief's legal arguments is only a minimum requirement. If the rule required nothing more, then the words "at a minimum" would be superfluous, contrary to the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). The rule therefore gives the Court discretion to order disclosure that goes beyond what is required "at a minimum." Because the redacted information is central to the issues in this case, such disclosure is appropriate here. Second, if Rule 7(j) were construed to permit the government's redacted filing, it would be unconstitutional for the reasons set forth below.

II. If Rule 7(j) were construed to permit the government's filing of heavily redacted submissions in this case, it would violate the First and Fifth Amendments

While *ex parte* filings may be permissible in some contexts, accepting the government's *ex parte* filing in this case would pose two constitutional problems: it would prevent the providers from participating fully in the resolution of their First Amendment claim, and it would violate the providers' procedural due process rights by depriving them of adequate safeguards to protect their substantive First Amendment rights. The government's response to both points is essentially the same: it asserts (Opp. 9) the general proposition that "courts can review classified national security information *ex parte* and *in camera*." That may be true, but it is not relevant here. The providers do not suggest that the government can never rely on *ex parte* filings to be reviewed *in camera*. Rather, they argue that the government cannot rely on *ex parte* filings to justify a prior restraint on speech in this case. The government is therefore wrong when it suggests (Opp. 9) that "[n]umerous courts

have rejected the same constitutional arguments the companies assert here." The government does not cite—and providers are not aware of—any case in which a court permitted the government to justify a prior restraint without explaining the reasons for the restraint so that they could be challenged by the party restrained.

First Amendment. In arguing that the providers should be prohibited from reviewing the core reasoning supporting its prior restraint, the government relies heavily on *Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003), in which, it says (Opp. 11-12), the court denied counsel access to classified information. In fact, the D.C. Circuit held only that the district court should not have ordered access to classified information without first determining "whether it can, consistent with the protection of Stillman's first amendment rights to speak and to publish, and with the appropriate degree of deference owed to the Executive Branch concerning classification decisions, resolve the classification issue without the assistance of plaintiff's counsel." 319 F.3d at 549. The D.C. Circuit went on to explain that, if the district court determined that the "need for such assistance outweighs the concomitant intrusion upon the Government's interest in national security," it could consider ordering disclosure. *Id. Stillman* thus supports the argument that, in a case like this one, the resolution of First Amendment claims may require that counsel be granted access to the classified information that forms a critical part of the government's legal argument.

Significantly, the court in *Stillman* emphasized the plaintiff's status as a government employee whose speech the government has a greater ability to control than that of a private citizen. As the court observed, "[i]f the Government classified the information properly, then Stillman simply ha[d] no first amendment right to publish it" because as part of his employment he "voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review" and because the CIA may "impos[e] reasonable restrictions on *employee* activities that in other contexts might be protected by the First Amendment." 319 F.3d at 548 (quoting *Snepp v. United States*, 444

U.S. 507, 510 n.3 (1980)) (emphasis added). That reasoning does not apply here because the providers are not government employees who voluntarily agreed to restrictions on their speech. They are private companies who wish to speak to their users and the public about whether, and if so how often, the government has ordered them to produce information. For that reason, this is just the kind of "other context" contemplated by the court in *Stillman* in which access to classified information is necessary to allow First Amendment claims to be fully litigated.[2]

Fifth Amendment Due Process Clause. The government cites (Opp. 9-11) various cases denying due process claims for access to classified information, but none of the cases establishes the broad proposition that such access is never appropriate. Instead, many of the cited cases held only that plaintiffs suing the government to force the disclosure of classified information do not have a right to see the very classified information they seek. *See Bassiouni v. FBI*, 436 F.3d 712 (7th Cir. 2006) (plaintiff seeking to amend FBI records regarding his contacts with the Middle East); *Patterson ex rel. Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990) (plaintiff seeking access to FBI records about himself); *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982) (suit seeking disclosure of records under FOIA); *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979) (plaintiffs seeking all NSA records about themselves). *Cf. Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991) (libel suit

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[2] The government also relies (Opp. 12-13) on *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), but that case, too, did not involve the question whether the Constitution permits the government to justify a prior restraint on the basis of *ex parte* submissions. Although the plaintiffs initially challenged the statute providing for *ex parte* submissions, 18 U.S.C. § 3511(e), they declined to appeal that issue, and neither the district court nor the Court of Appeals held that it would be permissible for the government to reply on an *ex parte* submission in any particular case. Rather, both courts merely stated that the question would depend on the circumstances. *See* 549 F.3d at 881 (referring to "*in camera* presentations *where appropriate*") (emphasis added); *Doe v. Gonzales*, 500 F. Supp. 2d 379, 423-24 (S.D.N.Y. 2007) (finding it "sufficient to simply reiterate that the Court's authority to assess what process is due on a case-by-case basis is undisturbed by the language of § 3511(e)" because it "neither restricts the ability of a district court to take all necessary measures required to safeguard the due process rights of a party in instances where evidence may be submitted in camera or ex parte, nor constrains the role of the district court in appropriately balancing those needs against a potentially compelling interest").

against FBI agent). That rule makes perfect sense: where the issue in the lawsuit is whether the government should be ordered to disclose classified information, requiring the government to disclose that information in its brief would moot the proceeding. But here, the providers have not filed a lawsuit to compel the government to disclose classified information they have never seen. Instead, they are challenging a prior restraint on their First Amendment rights to disclose information already in their possession and, within the specific context of this motion, are challenging the withholding of the information at issue only because the government has relied upon it to justify the restraint. Granting the providers access to that information would not give the providers the relief they seek in the underlying litigation; it would merely give them the ability to test the reasoning behind the government's prior restraint on speech about facts already known to them.

As the government concedes (Opp. 9), the due process clause does not prescribe a categorical rule either requiring or prohibiting disclosure in all cases; instead, it "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The government does not dispute that the test for determining what procedural protections are required is set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Here, the *Mathews* balancing test weighs heavily in favor of granting the providers' motion.

First, as explained in the motion to strike (at 7-8), the liberty interest at issue is vital: it is the right to engage in speech about the government. The government makes no effort to dispute the importance of that interest.

Second, the risk of an erroneous deprivation of First Amendment rights in *ex parte* proceedings is substantial. Indeed, that risk is illustrated by the government's opposition itself, which releases a footnote that, as the providers observed in the motion to strike (at 5 n.1), "comes in the middle of a paragraph that is otherwise entirely devoted to legal argument and that contains no factual discussion," making it difficult to see how it could be anything other than part of the legal

argument. In its opposition (Opp. 2 n.1), the government says that it "has since decided to release footnote 4," which was originally classified at the "Secret" level. While the government does not explain why it has decided to release the footnote now, it would appear that the government has concluded that its release will not, in fact, damage national security, and that it should not have been classified in the first place. That the government would classify an innocuous portion of its brief in this case—where the very issue to be decided is whether the government has acted appropriately in restricting the disclosure of information—demonstrates both the value of the adversarial process in testing the government's submissions and the substantial risk of an erroneous deprivation of the providers' First Amendment rights in an *ex parte* proceeding.

The apparent overclassification of footnote 4 is representative of a broader problem of overclassification that the government itself has acknowledged. *See, e.g.,* Reducing Over-Classification Act, § 2(3), Pub. L. No. 118-258, 124 Stat. 2648 (2010) (finding that "security requirements nurture over-classification," which "causes considerable confusion regarding what information may be shared with whom"); *Intelligence Oversight and the Joint Inquiry: Hearing Before the Nat'l Comm'n on Terrorist Attacks Upon the U.S.* (2003), available at http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.pdf (testimony of Rep. Porter Goss) ("[W]e overclassify very badly. There's a lot of gratuitous classification going on."). The practice of overclassification—the precise opposite of the narrow tailoring that the First Amendment requires—makes it essential that the Court have the assistance of an adversarial process in scrutinizing the government's assertion that the information at issue in this litigation cannot be disclosed without harming national security.

Third, while the government certainly has a compelling interest in protecting national security, it has made no effort to explain how disclosing the information at issue *to the providers* would

harm that interest.[3] Instead, the government relies on generalized assertions about the potential harm of disclosure (Opp. 8) and the question-begging claim that none of the providers, or their counsel, "has been found to have a 'need-to-know' any of the classified information" (Opp. 6). But the premise of the government's argument, both on this motion and on the merits, is that the assistance of electronic communications service providers is essential to national security and that any such assistance would involve information that implicates national security. For that reason, if any provider has, in fact, received a FISC order, the government already would have determined that the providers and their counsel have a need to know sensitive classified information. After all, each provider obviously knows the total number of orders it has received (if any), as well as the total number of affected accounts. Only now, in this lawsuit, does the government suggest that the providers cannot be trusted with sensitive information. The government should not be permitted to use selective need-to-know determinations to permit the providers and their counsel to access such information only when they are receiving FISC orders and not when they are seeking to challenge the government.

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[3] Several cases cited by the government (Opp. 9-11) are distinguishable because they involved requests for disclosure made by parties who were alleged to pose a threat to national security. *See Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007) (suit by plaintiffs detained on return to United States from conference in Canada where intelligence officials believed persons connected to terrorists were in attendance); *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004) (Saudi pilots challenging post-9/11 regulations that prevented them from flying commercial aircraft into the United States); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (plaintiffs challenging classification as foreign terrorist organization); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) (same); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (plaintiff challenging Treasury department order blocking its assets that allegedly were used to support terrorism); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (plaintiffs challenging classification as foreign terrorist organization). Here, of course, the government does not contend that the providers are a threat to national security.

CONCLUSION

The Court should order that, unless the government agrees to take appropriate steps to permit counsel for the providers to access the unredacted version of its September 30 filing, the redacted portions of that filing will be stricken.

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Respectfully submitted,

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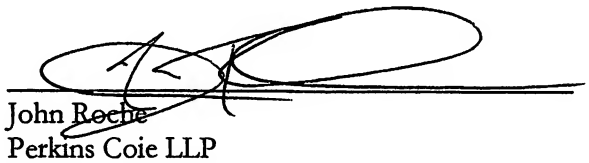
CERTIFICATE OF SERVICE

I hereby certify that at or before the time of filing this submission, the government (care of the Security and Emergency Planning Staff, United States Department of Justice) has been served with a copy of this motion pursuant to Rule 8(a) of the FISC Rules of Procedure.

Dated: December 20, 2013



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